

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1995 SESSION

<p>FILED</p> <p>September 27, 1995</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

STATE OF TENNESSEE,

Appellee,

V.

ANGELE FRANKLIN,

Appellant.

)
) C.C.A. No. 03C01-9402-CR-00061
)
) Sevier County
)
) Hon. Rex Henry Ogle, Judge
)
) (Delivery of Cocaine - 2 counts;
) Conspiracy to Sell and Deliver Cocaine;
) Casual Exchange of Cocaine - 2 counts)

FOR THE APPELLANT:

Edward Miller
District Public Defender

Dennis C. Campbell
Assistant Public Defender
P.O. Box 416
Dandridge, TN 37725

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

Sharon S. Selby
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Al Schmutzer, Jr.
District Attorney General

Duane Slone
Asst. Dist. Attorney General
Sevier County Courthouse
Sevierville, TN 37862

OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

OPINION

The defendant Angele Franklin pled guilty to two counts of delivery of over one-half gram of cocaine, one count of conspiracy to deliver cocaine and casual exchange of cocaine. The Criminal Court at Sevier County sentenced the defendant to eleven years in the Department of Correction for each delivery, five years for conspiracy and eleven months and twenty-nine days for casual exchange. The court ordered the sentences to run concurrently. The defendant appeals, challenging the length and manner of her sentence.

We affirm the judgment of the trial court.

I.

The defendant argues that the length of her sentence is excessive. When a defendant appeals a sentencing issue, this Court shall conduct a de novo review on the record with the presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (1990); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). The presumption of correctness is conditioned upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). We have reviewed the record and determined that the presumption of correctness attaches to the trial court's determinations. The burden rests upon the defendant to show that the sentence is improper. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

In conducting our review of the sentence imposed, we must consider the evidence received at trial and the sentencing hearing, the presentencing report, the principles of sentencing, the argument of counsel, the nature and characteristics of the offense, any mitigating or enhancing factors, statements made by the offender, and the potential for rehabilitation. T.C.A. § 40-35-210 (b)(1)-(6) (1990); Byrd, 861 S.W.2d at 379.

The defendant argues that the eleven year sentences for delivery of cocaine are excessive because two of the four enhancement factors found by the trial court are unsupported by the evidence. She also contends that the trial court improperly weighed the enhancement and mitigating factors. The sentence authorized for a standard offender convicted of a class B felony is from eight to twelve years. The trial court must start with the statutory minimum, enhance the sentence within the authorized range, and then reduce the sentence with the appropriate mitigating factors. T.C.A. § 40-35-210(e) (1990). The trial court relied on four enhancement factors to increase the defendant's sentence above the minimum of eight years: 1) the defendant has a previous history of criminal convictions or criminal behavior, 2) the defendant was a leader in the commission of an offense, 3) the defendant has a previous history of unwillingness to comply with conditions of release in the community, and 4) the defendant displayed no hesitation about committing a crime when the risk to human life was high. T.C.A. § 40-35-114(1),(2),(8) &(10) (1990). The court found evidence of one mitigating factor, that the defendant's conduct neither caused nor threatened serious bodily harm. T.C.A. § 40-35-113(1) (1990). Additionally, the trial judge found that the defendant is a threat to the community and that she displayed no remorse for her offenses, only anger. The trial judge said that he ran the defendant's sentences concurrently because of her young age. She was twenty-one years old at the time of sentencing.

The defendant argues that the trial court's finding that she was a leader in the commission of an offense is unsupported by the evidence. She asserts that the evidence showed that her codefendant was equally if not more culpable for the offenses involved. Her argument is without merit. The law requires that one be a leader, not the only leader. State v. Hicks, 868 S.W.2d 729, 731 (Tenn. Crim. App. 1993). The evidence is sufficient to support a finding of this factor. At the sentencing hearing, agent Steve Radcliff testified that in each of the four offenses, the defendant delivered the cocaine. He testified that she mentioned

having a "connection" in Strawberry Plains from whom she got her cocaine. The director of the drug task force testified that the defendant had supplied him with a list of over forty names of persons in the area who were involved in drugs. He said that the defendant explained that she could not set up buys from these people because in most cases she was their supplier.

The defendant next argues that the trial court erred in finding that she had no hesitation about committing a crime when the risk to human life was high. She essentially contends that the trial court applied this factor because the offenses involved a drug. The nature and effect of cocaine are essentially elements of the offense of possessing, selling or distributing cocaine. The legislature has already considered the inherent nature of cocaine by classifying it according to potential for abuse and resulting danger, and by setting punishment according to its classification or schedule. State v. Marshall, 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993). The holding in Marshall does not exclude, as a matter of law, the use of this factor to enhance a sentence when an accused has been convicted of an offense involving a controlled substance. The state argues that the pervasiveness of her activity constituted a high risk to human life. We understand but respectfully disagree. The pervasiveness of her activity should be accounted for by convictions. We find nothing in this record to support application of this factor to enhance the defendant's sentence.

Although the trial court erred by enhancing the defendant's sentence based on a risk to human life, the enhancement factors still outweigh the mitigating evidence. "The weight afforded an existing enhancing or mitigating factor is left to the trial court's discretion based upon the record before it." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). As evidenced by the presentence report, the defendant has a previous history of criminal conduct. As a juvenile, she was found beyond parental control in 1985 and sentenced to probation. In 1986, she violated probation and was committed to the Tennessee

Preparatory School. Also in 1986, she violated a court order and was committed to the Tennessee Department of Correction (TDOC). In 1988, she was again found beyond parental control and was sentenced to probation and community service. In 1988, she again violated a court order and was referred to the Koala Center. In 1989, she was committed to the TDOC for second degree burglary. The defendant's adult criminal record consists of a disorderly conduct conviction. The defendant is known to local law enforcement officers. Additionally, the defendant pled guilty to theft while out on bond for the present charges. The presentence report also establishes an unwillingness to comply with conditions of release in the community. The trial court placed great weight on these two factors, as evidenced by his comments at the sentencing hearing. The court also commented on the defendant's lack of remorse for the offenses and her disrespect for the law. The trial court found one mitigating factor. The court also considered that the defendant provided assistance to authorities that might lead to other convictions, and her young age. The defendant reported being employed at "Panasonic" but the personnel department did not have a record of her employment. There is evidence that she worked at a pancake house. The evidence in the record does not preponderate against the sentence imposed by the trial court.

II.

The defendant contends that the trial court erred in denying alternative sentencing. Certain drug offenders are eligible for alternative sentencing even though their sentence exceeds the six year maximum ordinarily required for eligibility. T.C.A. § 40-20-207 (1990). In determining whether a defendant should be incarcerated, the trial court shall consider the need to protect society by restraining a defendant having a long history of criminal conduct, the need to avoid depreciating the seriousness of the offense, the fact that confinement is particularly appropriate to effectively deter others likely to commit similar offenses, and the fact that less restrictive measures have often or recently been

unsuccessfully applied to the defendant. T.C.A. § 40-35-103 (1990); See State v. Hartley, 818 S.W.2d 370, 374 (Tenn. Crim. App. 1991). The defendant has a history of criminal conduct. The need to avoid depreciating the seriousness of the offense is evidenced by the defendant's lack of remorse. Finally, measures less restrictive than incarceration have often or recently been applied to the defendant. The defendant has failed to carry her burden of showing that the evidence preponderates against the trial court's denial of alternative sentencing.

The defendant also contends that her sentence is disproportionate to the one imposed upon her codefendant. We granted the defendant's motion to supplement the record on appeal with sentencing information pertaining to the defendant's codefendant, Darren Shields. Shields pled guilty to three counts of felonious sale of cocaine (two were deferred pleas). The court sentenced Shields to eight years incarceration with a specific recommendation for boot camp followed by supervised probation. Defendant Franklin received an effective sentence of eleven years incarceration. She argues that there is no basis for the inequality in the sentences. At the defendant's guilty plea hearing, the defendant agreed that the state could prove the following facts. The defendant delivered cocaine weighing over one-half of an ounce to a confidential informant on July 26, 1992, and August 20, 1992. She delivered cocaine that she received from Shields to an undercover agent on August 4, 1992. She delivered cocaine weighing over one-half of an ounce to an undercover agent on August 31, 1992.

One of the express principles of the Criminal Sentencing Reform Act of 1989 is to "assure fair and consistent treatment of all defendants by eliminating unjustified disparity in sentencing and providing a fair sense of predictability of the criminal law and its sanctions." T.C.A. § 40-35-102(2) (Supp. 1994). The Sentencing Commission Comments to this subsection state the purpose of this section as "eliminating unjustified disparity in sentencing and thereby providing

predictability." See State v. Jenkins, 733 S.W.2d 528, 534 (Tenn. Crim. App. 1987). The defendant's extensive history of criminal conduct, her unwillingness to comply with conditions of release in the community, her lack of remorse for the present offenses, and the trial court's finding that she was a threat to society are rational reasons for any difference in sentencing. The defendant's history of criminal conduct is more extensive than Shields. There is no evidence that the trial court found that Shields has a prior history of an unwillingness to comply with release in the community. No evidence exists that Shields lacked remorse for the offenses to which he pled guilty, indicating that his potential for rehabilitation is greater than the defendant's potential for rehabilitation. This issue is without merit.

III.

The defendant asserts that her rights to due process and equal protection were violated because a special alternative incarceration unit is not available for female offenders. Tennessee Code Annotated Section 40-20-201 (1990) authorizes the TDOC to operate an incarceration unit where qualified offenders participate in an intensive regimen of work, exercise, and military-type discipline instead of incarceration, commonly called the "boot camp" program. Upon successful completion of the program, the offender shall be placed on probation for the remainder of the original sentence. T.C.A. § 40-20-206 (1990). Although the relevant statutory provisions are gender-neutral, the boot camp eligibility criteria established by the TDOC specifically limit eligibility to male offenders. See Opinion of the Attorney General, No. 94-052 (April 4, 1994). The state responds that the defendant has not shown that the trial court would have recommended placement in an alternative incarceration unit had one been available for female offenders. Although the defendant's counsel argued that "she would be a perfect candidate for boot camp," it is apparent that the trial court did not share that view. The trial court found that the defendant previously failed to comply with conditions of release in the community, that she lacked

remorse for her offenses, and that she is a threat and menace to society. The issues of whether this defendant's rights to due process or equal protection have been violated by the lack of special alternative incarceration program for female defendants are not raised by the facts of this case. Accordingly, this issue is without merit.

AFFIRMED

PAUL G. SUMMERS, JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

WILLIAM M. BARKER, JUDGE